A

DATO' SRI MOHD NAJIB HJ ABD RAZAK v. PP & OTHER APPEALS (NO 1)

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ABANG ISKANDAR CJ (SABAH & SARAWAK)
B NALLINI PATHMANATHAN FCJ
MARY LIM FCJ
MOHAMAD ZABIDIN MOHD DIAH FCJ
[CRIMINAL APPEAL NOS: 05(L)-289-12-2021, 05(L)-290-12-2021 & 05(L)-291-12-2021]
C 16 AUGUST 2022
[2022] CLJ JT(9)

Abstract – *The applicant sought leave of the Federal Court to adduce additional or fresh evidence pending the main appeals from the decision* D *of the Court of Appeal, which affirmed the High Court's decision to convict him on seven charges and to sentence him accordingly. The proposed additional evidence sought to establish a conflict of interest giving rise to bias on the part of the trial judge and on that ground, declare that the entire trial in the High Court in the SRC case null and* E *void. However, the applicant failed the cumulative test in the landmark case of R v. Parks by failing to establish the first two elements in the said test, namely 'availability' and 'relevancy'.*

F ***CIVIL PROCEDURE:*** *Leave – Federal Court – Applicant sought leave of court to adduce additional or fresh evidence pending appeals – Documentary and viva voce evidence – Additional/fresh evidence sought to establish conflict of interest giving rise to bias on part of trial judge – Whether cumulative test in R v. Parks satisfied – Courts of Judicature Act 1964, s. 93*

G ***EVIDENCE:*** *Fresh or further evidence – Federal Court – Applicant sought leave of court to adduce additional or fresh evidence pending appeals – Documentary and viva voce evidence – Additional/fresh evidence sought to establish conflict of interest giving rise to bias on part of trial judge – Whether cumulative test in R v. Parks satisfied – Courts of Judicature Act 1964, s. 93*

H The appellant ('applicant'), through the filing of three motions which were identical in substance, sought leave of the court to adduce additional or fresh evidence pending the main appeals before the Federal Court. The list of the proposed additional evidence, which constituted documentary evidence and *viva voce* evidence of witnesses, were contained in paras. 19 and 20, respectively, of this judgment. The applicant submitted that the proposed I additional evidence: (i) sought to establish the fact of conflict and/or bias on the part of Mohd Nazlan Mohd Ghazali J ('trial judge'), on account of His

Lordship's role as group counsel and group company secretary of the Maybank Group of Companies, including Maybank Investment Berhad ('MIB') *circa* the time material to the seven charges against the applicant; (ii) will establish the trial judge's involvement with Maybank and subsequently, establish a 'real danger of bias' on His Lordship's part in three material aspects: (a) MIB and, by extension, the trial judge's role in the establishment of SRC International Sdn Bhd ('SRC'); (b) Maybank and the trial judge's role relating to the RM140 million loan to Putra Perdana Development, which was credited to SRC, and where RM42 million found its way into the applicant's personal AmIslamic Bank accounts; (c) Maybank's loan of RM4.17 billion to 1Malaysia Development Berhad ('1MDB') and its subsequent possible default and the trial judge's role in this; and (iii) have crossed the threshold set by s. 93 of the Courts of Judicature Act 1964 ('CJA') and the common law rules applied in Malaysia derived foremost from the decision of the English Court of Appeal in *R v. Parks* ('*Parks*').

Held (dismissing motions)

Per Tengku Maimun Tuan Mat CJ, Abang Iskandar CJ (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah FCJJ delivering the judgment of the court:

(1) The law on the admission of additional evidence is contained within s. 93 of the CJA. The test to adduce fresh evidence under this section is to be gathered from the words '... if it [meaning the court] thinks additional evidence to be necessary ...'. Admission of such evidence is thus a matter of judicial discretion. Judicial discretion is, in turn, exercised by reference to decided judicial precedent. The landmark case in this regard was the decision in *Parks*. The four cumulative elements in *Parks*, were: (i) the evidence that is sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) the evidence must be credible evidence in the sense that it is well capable of belief; and (iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial. If any one of the elements is not fulfilled, then the application for fresh or additional evidence will fail. (paras 11 & 14)

(2) According to the respondent, DSN-16, a copy of the 1MDB board of directors' minutes of meeting dated 6 September 2010, was served on the applicant in the 1MDB trial a month before the defence commenced its case in the SRC trial. Counsel in the 1MDB trial and the SRC trial was the same. DSN-16 was thus available to the applicant for use in his defence in the SRC trial and the supposed involvement of MIB, which was mentioned in DSN-16, could have been raised before the trial judge. The same could be said of DSN-14, a copy of the letter dated

14 September 2010 from MIB to 1MDB. Since the test is one of availability, and DSN-16 was available to the applicant even if he was not served in relation to the present SRC case, he could have obtained DSN-14 or raised suspicions regarding the possible existence of DSN-14 to the respondent by reference to DSN-16. Specifically, upon examining DSN-16, which stated the proposed role of MIB and its subsidiary, Bina Fikir Sdn Bhd, it would have been open to the applicant to then ask for any evidence related to DSN-16 to be produced to him, which would mean that DSN-14 could have been obtained by reasonable diligence. It was not as if the trial judge's previous employment with the Maybank Group of Companies was a secret to any party such that his subsequent involvement with them came as a surprise. Thus, in relation to DSN-14 and DSN-16, the first element of *Parks* had not been satisfied. (paras 29-31)

(3) The court was not convinced that the trial judge made His Lordship's findings based on anything other than the evidence on record. There was no nexus between the trial judge's previous employment with Maybank and the charges against the applicant so as to suggest conflict of interest, giving rise to bias. The entirety of the additional evidence sought to be introduced was irrelevant to the charges preferred against the applicant and failed to disclose any conflict of interest on the part of the trial judge. Therefore, all the additional evidence sought to be adduced, both oral and documentary, failed to meet the second requirement of *Parks*, in that, it was not relevant to the charges levied against the applicant. The applicant failed to cross the high threshold of s. 93 of the CJA and decided judicial authorities. (paras 39-41 & 47)

Bahasa Melayu *Headnotes*

Perayu ('pemohon'), melalui pemfailan tiga usul yang amnya sama, memohon kebenaran mahkamah untuk mengemukakan keterangan baharu sementara menanti rayuan-rayuan utama di Mahkamah Persekutuan. Senarai keterangan tambahan dicadangkan, yang terdiri daripada keterangan dokumentar dan keterangan *viva voce* saksi-saksi, masing-masing terkandung dalam perenggan 19 dan 20 penghakiman ini. Pemohon menghujahkan bahawa keterangan tambahan dicadangkan: (i) berniat membuktikan fakta konflik dan/atau berat sebelah oleh Mohd Nazlan Mohd Ghazali H ('hakim bicara'), bersangkutan peranan beliau sebagai Peguam Am dan Setiausaha Syarikat Maybank Group of Companies, termasuk Maybank Invest Berhad ('MIB') sekitar masa material pemohon berhadapan dengan tujuh pertuduhan; (ii) akan membuktikan penglibatan hakim bicara dengan Maybank dan berikutan itu, membuktikan 'bahaya benar berat sebelah' oleh beliau dalam tiga aspek penting: (a) MIB dan, lanjutan itu, peranan hakim bicara dalam pewujudan SRC International Sdn Bhd ('SRC'); (b) Maybank dan peranan hakim bicara dalam pinjaman RM140 juta kepada Putra Perdana Development, yang dikreditkan ke dalam SRC, yang daripadanya RM42 juta

dimasukkan dalam akaun-akaun peribadi AmIslamic Bank permohon; (c) pinjaman Maybank sebanyak RM4.17 bilion kepada 1 Malaysia Development Berhad ('1MDB') dan kemungkinan kemungkiran seterusnya dan peranan hakim bicara dalam hal ini; dan (iii) mencapai ambang yang ditetapkan oleh s. 93 Akta Mahkamah Kehakiman 1964 ('AMK') dan kaedah common law di Malaysia yang terulung timbul daripada keputusan Mahkamah Rayuan Inggeris dalam *R v. Parks* ('*Parks*')

Diputuskan (menolak usul-usul)
Oleh Tengku Maimun Tuan Mat KHN, Abang Iskandar HB (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah HHMP menyampaikan penghakiman mahkamah:

(1) Undang-undang tentang penerimaan keterangan tambahan termaktub dalam s. 93 AMK. Ujian untuk mengemukakan keterangan baharu bawah seksyen ini boleh ditafsir berdasarkan perkataan-perkataan ' ... jika difikirkannya (bermaksud mahkamah) bahawa keterangan tambahan adalah perlu …'. Penerimaan keterangan, oleh itu, satu hal perkara budi bicara kehakiman. Budi bicara kehakiman pula dijalankan dengan rujukan pada duluan kehakiman yang sudah diputuskan. Kes penting dalam hal ini adalah keputusan dalam *Parks.* Empat elemen kumulatif dalam *Parks*, adalah: (i) keterangan yang ingin dikemukakan mestilah keterangan yang tidak tersedia ada semasa perbicaraan; (ii) keterangan mestilah relevan dengan isu-isu; (iii) keterangan mestilah keterangan kredibel iaitu boleh dipercayai; dan (iv) mahkamah akan, selepas mempertimbangkan keterangan tersebut, seterusnya mempertimbangkan sama ada mungkin terdapat keraguan munasabah dalam minda juri tentang kebersalahan pemohon jika keterangan tersebut telah diberi bersama-sama dengan lain-lain keterangan semasa perbicaraan. Jika salah satu elemen ini tidak dipenuhi, permohonan keterangan baharu atau tambahan akan gagal.

(2) Menurut responden, DSN-16 diserahkan pada pemohon dalam perbicaraan 1MDB sebulan sebelum pembelaan memulakan kesnya dalam perbicaraan SRC. Peguam dalam perbicaraan 1MDB dan perbicaraan SRC adalah sama. Oleh itu, DSN-16 tersedia ada untuk digunakan oleh pemohon dalam pembelaan beliau dalam perbicaraan SRC dan penglibatan MIB yang didakwa, yang disebut dalam DSN-16, sepatutnya boleh dibangkitkan di hadapan hakim bicara. Perkara yang sama boleh dikatakan tentang DSN-14. Oleh kerana ujian adalah berbentuk kesediaan, dan DSN-16 tersedia ada buat pemohon jika pun beliau tidak diserahkan berkaitan kes SRC semasa, beliau sepatutnya boleh memperoleh DSN-14 atau membangkitkan kesangsian tentang kemungkinan kewujudan DSN-14 pada responden dengan merujuk pada DSN-16. Khususnya, selepas memeriksa DSN-16, yang menyatakan

peranan MIB yang disarankan dan subsidiarinya, Bina Fikir Sdn Bhd, adalah terbuka buat pemohon untuk kemudian meminta agar apa-apa keterangan berkaitan DSN-16 dikemukakan pada beliau, yang bermaksud DSN-14 seharusnya boleh diperoleh melalui usaha munasabah. Perkhidmatan terdahulu hakim bicara, dengan Maybank Group of Companies, bukanlah satu rahsia pada mana-mana pihak hinggakan penglibatan terkemudian beliau dengan mereka menjadi satu kejutan. Ekoran itu, untuk DSN-14 dan DSN-16, elemen pertama *Parks* tidak dipenuhi.

(3) Mahkamah tidak yakin bahawa hakim bicara membuat dapatan-dapatan beliau berasaskan apa-apa selain keterangan yang direkodkan. Tiada kaitan antara perkhidmatan terdahulu hakim bicara dengan Maybank dengan pertuduhan-pertuduhan terhadap pemohon hingga mencadangkan konflik kepentingan yang menimbulkan berat sebelah. Keseluruhan keterangan tambahan yang ingin dikemukakan tidak relevan dengan pertuduhan-pertuduhan yang dilemparkan terhadap pemohon dan gagal mendedahkan apa-apa konflik kepentingan oleh hakim bicara. Susulan itu, kesemua keterangan tambahan yang ingin dikemukakan, lisan mahupun dokumentar, gagal memenuhi syarat kedua *Parks* iaitu kesemuanya tidak relevan dengan pertuduhan-pertuduhan terhadap pemohon. Pemohon gagal memenuhi ambang tinggi s. 93 AMK dan nas-nas kehakiman yang telah diputuskan.

Case(s) referred to:

Dato' Sri Mohd Najib Hj Abd Razak v. PP [05(L)-297-12-2021, 05(L)-299-12-2021 & 05(L)-301-12-2021 (16 March 2022)] (Unreported) ***(refd)***
Ex Parte Pinochet Ugarte (No. 2) [2000] 1 AC 119 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Government Of Malaysia [1970] 1 LNS 56 FC ***(refd)***
Murugayah v. PP [2004] 2 CLJ 489 CA ***(refd)***
R v. Parks [1961] 3 All ER 633 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 93
Criminal Procedure Code, s. 51A

For the appellant - Hisyam Abdullah, Mohd Zaid Ibrahim, Liew Teck Huat, Rueben Mathiavaranam, Hannah Kam Zhen Yi, Kee Wei Lon, Low Wei Loke & Ong Kang Nyong; M/s Zaid Ibrahim Suflan TH Liew & Partners
For the respondent - V Sithambaram, Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul & Manjira Vasudevan; DPPs
Watching Brief:
For the Bar Council - Tiu Foo Woei; M/s Azri, Lee Swee Seng & Co

Reported by Najib Tamby

JUDGMENT

(Motions to Adduce Additional/Further Evidence)

Tengku Maimun Tuan Mat CJ, Abang Iskandar CJ (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah FCJJ:

Introduction

[1] There are three motions before us in encl. 210 (in appeal 289), encl. 31 (in appeal 290) and encl. 32 (in appeal 291) filed by the appellant-applicant to adduce additional or fresh evidence pending the main appeals before the Federal Court from the decision of the Court of Appeal which affirmed the High Court's decision to convict him on all seven charges and to sentence him accordingly. As the three motions are identical in substance, we shall treat the three motions in encls. 210, 31 and 32 collectively as one single motion and refer to it as 'the motion'.

[2] The applicant, after filing the motion, filed three further yet identical motions to amend the motion *via* encl. 229 (in appeal 289), encl. 228 (in appeal 290) and encl. 218 (in appeal 291).

[3] At the outset of the hearing yesterday, we noted that both parties' written submissions on the motion had been prepared on the assumption that the motion was amended. In the circumstances, we had allowed the amendments to the motion and had ordered in terms of encls. 229, 228 and 218 but with the caveat that we were not making any determination on the substantive merits of the amended motion and the order to amend was without prejudice to the respondent's objections on privilege and other related issues.

[4] We have read the motion (as amended) and pored through the affidavits filed in relation to it, including the affidavits on the amended motion. We have also carefully considered parties' submissions – written and oral and after careful and considered deliberation, this is our unanimous decision on the motion.

[5] We must state at the outset that in considering the motion, we paid no heed, at this stage, to the substantive question or merits on the issues relating to the lower courts' concurrent findings of guilt on the part of the applicant in the main appeals. In other words, the main appeals are a separate matter entirely and our determination of the merits of the motion have absolutely no bearing to our consideration on the merits of the main appeals in the event that the motion is dismissed.

Background

[6] The primary purpose of the motion is to seek leave of this court to adduce additional or fresh evidence to establish a conflict of interest giving rise to bias on the part of the learned trial judge, Justice Mohd Nazlan bin

A Mohd Ghazali ('Justice Nazlan') and on that ground, declare that the entire trial in the High Court in this SRC case null and void and for this court to consider further relief(s), including an order for a retrial.

[7] The argument in support of the motion is that the additional evidence, which constitutes documentary and *viva voce* evidence of certain witnesses
B will, when adduced, seek to establish the fact of conflict and/or bias on the part of Justice Nazlan on account of his role as group counsel ('GS') and Group Company Secretary ('GSC') of the Maybank Group of Companies including Maybank Investment Berhad *circa* the time material to the seven charges against the applicant.

C **[8]** Learned counsel for the applicant, Tuan Haji Hisyam Teh argues that the various documentary and *vica voce* evidence will be able to establish Justice Nazlan's involvement with Maybank, and thereby establish a 'real danger of bias' on his part, in three material respects, as follows:

D (i) Firstly, Maybank Investment Berhad ('MIB') and by extension, Justice Nazlan's role in the establishment of SRC International Sdn Bhd ('SRC');

(ii) Secondly, according to the applicant, Malayan Banking Berhad ('Maybank') and Justice Nazlan's role relating to the RM140 million
E loan to Putra Perdana Development ('PPD') which was credited to SRC and wherefrom RM42 million found its way into the applicant's personal AmIslamic Bank accounts, namely accounts 880 and 906.

(iii) Thirdly, Maybank's loan of RM4.17 billion to 1Malaysia Development Berhad ('1MDB') and its subsequent possible default and Justice
F Nazlan's role therein.

[9] The learned Tuan Haji Hisyam submits that the proposed additional evidence, both documentary and *viva voce* have crossed the threshold set by s. 93 of the Courts of Judicature Act 1964 ('CJA 1964') and the common law rules applied in Malaysia derived foremost from the decision of the English
G Court of Appeal in *R v. Parks* [1961] 3 All ER 633 ('*Parks*').

[10] The respondent resists the motion. The basis of their objection is that essentially, s. 93 of the CJA 1964 has not been met. Allowing the additional evidence to be taken would run afoul of the important concept of finality of
H litigation and in any event, the evidence sought to be adduced is hearsay and thus incredible. The respondent also submits that the proposed *viva voce* evidence of certain MACC officers is privileged.

I

Decision/Analysis

The Law On The Admission Of Additional Evidence

[11] The law on the admission of additional evidence is contained within s. 93 of the CJA 1964. The section, in material part, reads thus:

> **Additional evidence**
>
> 93. (1) In dealing with any appeal in a criminal case the Federal Court may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the High Court.

[12] The test to adduce fresh evidence under this section is to be gathered from the words 'if it (meaning the court) thinks additional evidence to be necessary'. Admission of such evidence is thus a matter of judicial discretion. Judicial discretion is in turn exercised by reference to decided judicial precedent. The landmark case in this regard is the decision of the English Court of Appeal in *Parks* (*supra*) which was cited with approval and applied by this court most recently in *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [05(L)-297-12-2021, 05(L)-299-12-2021 and 05(L)-301-12-2021 (16 March 2022)] ('*Najib Razak*').

[13] The four cumulative elements in *Parks*, as stated by Lord Parker CJ are these:

(i) Firstly, the evidence that is sought to be called must be evidence which was not available at the trial.

(ii) Secondly, and this goes without saying, it must be evidence relevant to the issues.

(iii) Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief.

(iv) Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial.

[14] As decided by this court in *Najib Razak*, the elements being cumulative means that if any one element is not fulfilled, then the application for fresh or additional evidence will fail. The test is necessarily stringent given the need to preserve finality in litigation.

[15] The four cumulative elements in *Parks* are actually a reformulation of the three elements stated by Lord Denning in *Ladd v. Marshall* [1954] 3 All ER 745 ('*Ladd*'). Thus, the first element of *Parks*, should be read together with Lord Denning's first element, at p. 748, which is that 'it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial'.

[16] In *Najib Razak*, this court also endorsed the views of the Court of Appeal in *Murugayah v. PP* [2004] 2 CLJ 489; [2004] 2 MLJ 545 ('*Murugayah*') that the affidavit in support of a motion to adduce fresh evidence must also state exactly what it is the witness sought to be called is prepared to say if he is called to give additional evidence. This is what was observed by Augustine Paul JCA (as he then was) in *Murugayah*:

> [10] ... However, what is essential is that the affidavit that has been filed in support of the application must state exactly what witness would be called, exactly what that witness would be prepared to say or prove, or of what inquiries had been made before the trial, or what subsequent inquiries had resulted in the disclosure of the evidence (see *Wollongong Corporation v. Cowan* (1955) 93 CLR 435).

[17] The keywords are 'must state exactly'.

The Proposed Additional Evidence

[18] The proposed additional evidence that the applicant seeks to introduce is set out in his submission. This includes, according to the applicant, the following.

[19] Documentary evidence constituting the following:

(i) DSN-11: A copy of the Maybank minutes of the Group Management Committee meeting dated 7 March 2012;

(ii) DSN-12: A copy of the Maybank minutes of the Credit Review Committee meeting dated 7 March 2012;

(iii) DSN-13: A copy of the minutes of the special meeting no. 2 of the financial year 2012 of the board of directors of Maybank;

(iv) DSN-14: A copy of the letter dated 14 September 2010 from MIB to 1MDB;

(v) DSN-15: A copy of a news article dated 14 March 2022 published in Malaysia Today titled "*Shocking Revelation: Najib's Trial Judge Nazlan's Conflict-of-interest Exposed*";

(vi) DSN-16: A copy of the 1MDB board of directors' minutes of meeting dated 6 September 2010;

(vii) DSN-17: A copy of the relevant parts of the Maybank annual report 2010;

(viii) DSN-18: A copy of the article dated 26 April 2022 published in Malaysia Today titled '*Maybank is also Responsible for the SRC Disaster*';

(ix) DSN-19: A copy of late paper for GMCC on 26 March 2012 containing, among other documents, special meeting no. 2 of the financial year 2012 of the board of Maybank held on 12 March 2012, resolution for item No. SB 2/2012;

(x) DSN-20: A copy of Maybank email thread dated 5 February 2015;

(xi) DSN-21: A copy of email dated 10 February 2015;

(xii) DSN-22: A copy of Maybank letter from Group General Counsel to the directors of Maybank dated 10 February 2015 together with Maybank memorandum dated 10 February 2015;

(xiii) DSN-23: A copy of minutes of 4/2010 meeting of the board of directors of 1MDB dated 5 April 2010;

(xiv) DSN-24: A copy of AmIslamic folder for account number 211-202-200973-6 for SRC International Sdn Bhd.

[20] The *viva voce* evidence of the following witnesses, namely:

(i) Datuk Shahrol Azral Ibrahim Halmi, ex-Chief Executive Officer of 1MDB;

(ii) Rosli bin Hussein (PW57), an investigating officer of the MACC in relation to the SRC case investigation;

(iii) Mohamad Zamri Zainul Abidin, Head of AMLA in MACC;

(iv) Asrul Ridzuan bin Ahmad Rustami, officer in AMLA Division, MACC;

(v) Noor Syazana binti Kamin, assistant investigating officer in MACC;

(vi) Zain Bador, Director & Head of Strategic Advisory of MIB, and director in Bina Fikir Sdn Bhd;

(vii) Fazilah binti Abu Bakar, the Secretary to the Credit Committee, Maybank Group; and

(viii) Michael Oh-Lau, the Managing Director, Head of Debt Markets, MIB.

[21] Learned counsel for the applicant stresses that all the above evidence could not have been obtained with reasonable diligence at trial and this therefore satisfies the first element of *Parks*. He stated that it is not atypical for cases like this that attract tremendous public interest that the accused would receive tip-offs from anonymous sources. To this extent, he cited the example of an anonymous telephone call in *Ex Parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119, at p. 128. And so, Tuan Haji Hisyam submits that the applicant only recently received the proposed additional evidence around May 2022 and July 2022.

[22] Learned counsel for the applicant went on to submit that the proposed additional evidence, when considered in totality is relevant because it establishes Justice Nazlan's conflict of interest *vis-à-vis* the SRC trial and affects his findings on *mens rea* on the part of the applicant. The evidence is also credible and reliable because it is, in effect, from independent sources and is thus, capable of belief. And, once admitted, it would establish conflict

of interest and/or bias, and thereby vitiate the entire trial in the High Court. Based on this, the applicant submits that the four cumulative elements in *Parks* are met and the motion ought to be allowed.

[23] The respondent submits that some of the evidence sought to be introduced, especially DSN-16 was available at trial. And, because DSN-14 is connected to DSN-16, DSN-14 would have also been available, in effect, if the applicant or his counsel had used reasonable diligence.

[24] Learned counsel for the applicant maintains that even if the evidence was available as contended by the respondent, the material evidence was served on the applicant only in relation to the separately ongoing 1MDB trial and not in the SRC trial which is the subject of the pending appeals before us.

[25] The respondent in any event submits that the proposed additional evidence is all irrelevant to the charges as framed and this fails to meet the second element of *Parks*. They also object to the admission of such additional evidence because they claim hearsay, privilege and breach of secrecy under the Official Secrets Act 1972.

[26] Having recapped the law and stated the gist of parties' rivalling contentions, we shall now proceed to state our findings in respect of the motion.

Application Of The Law To The Facts

Reasonable Diligence

[27] Preliminarily, we agree with learned Deputy Public Prosecutor for the respondent, Dato' V Sithambaram that the question of the availability of the evidence is quite apart from the question of the prosecution's duty to deliver certain documents under s. 51A of the Criminal Procedure Code ('CPC').

[28] Both *Parks* and *Ladd* as well as the slew of cases decided thereafter emphasise the point of 'availability' of the evidence and whether it was discoverable by reasonable diligence by the party seeking leave to adduce the additional evidence. In this regard, the issue is quite apart from the respondent's compliance or non-compliance with s. 51A of the CPC. Rather, it is a question of whether the evidence was available to the applicant.

[29] According to the respondent, they had served DSN-16 on the applicant in the 1MDB trial on 4 November 2019 which is a month before the defence commenced its case in the SRC trial on 3 December 2019. It bears mentioning here that counsel for the applicant in the 1MDB trial and the SRC trial was the same, *ie*, Tan Sri Muhammad Shafee bin Abdullah. DSN-16 was thus available to the applicant for use in his defence in the SRC case and the supposed involvement of MIB which is mentioned in DSN-16 could have been raised before Justice Nazlan, for both parties conceded

during argument that they knew, even before the commencement of trial, of Justice Nazlan's position as GC and GSC of the Maybank Group of Companies before his elevation to the Bench.

[30] In our view, the same can be said of DSN-14. Since the test is one of availability, and DSN-16 was available to the applicant even if he was not served in relation to the present SRC case, he could have obtained DSN-14 or raised suspicions regarding the possible existence of DSN-14 to the respondent by reference to DSN-16. Specifically, upon examining DSN-16 which states the proposed role of MIB and its subsidiary, Bina Fikir Sdn Bhd., it would have been open to the applicant to then ask for any evidence related to DSN-16 to be produced to him, which would mean that DSN-14 could have been obtained by reasonable diligence. It is not as if Justice Nazlan's previous employment with the Maybank Group of Companies was a secret to any party such that his subsequent involvement with them came as a surprise.

[31] Thus, in relation to DSN-14 and DSN-16, it is our finding that the first element of *Parks* has not been satisfied. As the test is cumulative, we need not consider whether these pieces of evidence have met the other three elements of *Parks* – apart from our further findings below. This is consistent with the decision of the Federal Court in *Lau Foo Sun v. Government Of Malaysia* [1970] 1 LNS 56; [1970] 2 MLJ 70 where an application to adduce additional evidence was dismissed solely on the ground that it could have been obtained by use of reasonable diligence. Suffian FJ, at p. 71 said thus:

> I do not think that the appellant has satisfied the first condition. He knew that Mr. Callow was at the material times chief architect at the Ministry of Education, that he had direct knowledge as to what drawings he (the appellant) was required (a) to trace, (b) to modify where necessary, and (c) to prepare new designs from Government drawings and the reasons which made the drawings necessary, and that Mr. Callow's evidence would therefore be important to the appellant's case. The appellant was not an ignorant and unrepresented rustic but the head of an important engineering firm represented by an eminent firm of solicitors. He contrived to trace Mr. Callow's address after judgment and I am of the opinion that it cannot be said that it could not have been obtained before the trial had he used reasonable diligence.

Relevancy

[32] This leads us to the rest of the additional evidence that the applicant seeks to adduce. Our findings here, though not strictly necessary, are also relevant in relation to the earlier exhs. DSN-14 and DSN-16. We are here referring to the second element of *Parks*, that is to say, relevancy.

[33] The question of relevancy is inextricably linked to the seven charges preferred against the applicant. The first charge alleges abuse of power. The next three charges allege criminal breach of trust while the last three charges

relate to money laundering. The crucial question insofar as relevancy is concerned is whether Justice Nazlan's employment with the Maybank Group of Companies and his role therein is in any way relevant to the seven charges to the point that there may be a real danger of bias.

[34] In relation to the first charge, that is the abuse of power charge, the allegation is that the applicant had abused his position as the Prime Minister of Malaysia and Minister of Finance to secure Government guarantees for a loan by Kumpulan Wang Persaraan (Diperbadankan) ('KWAP') amounting to RM4 billion to be issued in favour of SRC International Sdn Bhd with the applicant's further view (as alleged) to channelling therefrom RM42 million to his own personal advantage.

[35] The applicant's learned counsel highlighted to us how Justice Nazlan made findings to the effect that the applicant had overarching control over SRC International Bhd and had thus intended to establish SRC International Bhd to benefit himself. In this regard, the applicant sought to adduce DSN-16 and DSN-14 as well as call the MACC officers who, in the course of their investigations, recorded statements from Justice Nazlan and related parties (such as Fazilah binti Abu Bakar and Michael Oh-Lau) on Justice Nazlan's purported involvement in the establishment of SRC and later transactions relating to the RM140 million Maybank loan to PPD or the RM4.17 billion Maybank loan to 1MDB.

[36] With respect, we fail to see how any of the proposed additional evidence relates to the first charge on abuse of power. The respondent denies that MIB was involved in the establishment of SRC International Bhd in the manner suggested by the applicant but even if MIB was involved, the question is how is MIB and by extension Justice Nazlan's involvement in any way material to the question of abuse of power on the part of the applicant as Prime Minister and/or Minister of Finance?

[37] The applicant contends that the findings of 'overarching control' by Justice Nazlan in relation to the applicant could in some ways have been coloured by his involvement in Maybank and his personal knowledge relating to the transactions. The respondent's response is that Justice Nazlan's findings were made on the basis of evidence disclosed at trial. There is, according to the respondent, no basis to suggest that Justice Nazlan's professional association with Maybank did in any way affect his finding on abuse of power.

[38] We state again here that we have not examined the correctness of the findings of Justice Nazlan in relation to the abuse of power. These are questions for the main appeals. But, at this stage, and for the purposes of the motion, we are not in any way convinced that the proposed evidence establishes anything to the effect that Justice Nazlan's findings were in any way mired by any discreet or undisclosed personal interest on his part on the

establishment of SRC International Sdn Bhd and its subsequent operation such as to render him a conflicted or biased judge. Nor do we find anything in the motion that Justice Nazlan had any particular knowledge or was inspired by any extraneous considerations gained from his previous employment with Maybank to sustain any of his factual or legal findings in respect of the seven charges against the applicant.

[39] The next point in the argument of learned counsel for the applicant is that Justice Nazlan knew about the source of the monies when they were allegedly misappropriated by the applicant from SRC International Sdn Bhd. As conceded by Tuan Haji Hisyam in the course of his submission on the motion, it is trite law that in cases involving criminal breach of trust, the source of the misappropriated monies is not relevant. What is important to establish as an ingredient of the charge of criminal breach of trust is that the accused had dominion over the funds and that they were misappropriated. From our observations, we are not convinced that Justice Nazlan made his findings based on anything other than the evidence on record. We further find that there is no nexus between Justice Nazlan's previous employment with Maybank and the charges against the applicant so as to suggest conflict of interest, giving rise to bias. Whether or not Justice Nazlan's findings are correct, on the evidence on record, is the subject for consideration in the main appeals.

[40] Viewed in this light, the entirety of the additional evidence sought to be introduced (as set out above), is in our view, irrelevant to the charges preferred against the applicant and fails to disclose any conflict of interest on the part of Justice Nazlan.

[41] Thus, it is our view, that all the additional evidence sought to be adduced, both oral and documentary, fails to meet the second requirement of *Parks* in that it is not relevant to the charges levied against the applicant.

Allegations Of Bias

[42] At this juncture, it is our view that though the applicant has cited the correct authorities in relation to the test on bias, the proposed additional evidence fails to disclose any nexus between Justice Nazlan and the charges preferred against the applicant. We need not therefore consider those cases cited.

[43] In any event, and further to our views above, we agree with the respondent that the applicant has further failed to meet the *Murugayah* requirement which was affirmed by this court recently in *Najib Razak*. In other words, we find that the applicant's affidavit in support of the motion as amended), fails to state exactly what it is the proposed additional evidence, both documentary and oral, will prove or say in relation to the charges

A brought against him. It is in that sense, as put by the respondent, a call by the applicant on the court to investigate on possible bias rather than to act on any reliable or relevant evidence that can establish any real danger of bias.

[44] A point was also made by learned counsel for the applicant that the dismissal of the motion would occasion a miscarriage of justice on the part B of the applicant. With respect, we are unable to agree. For reasons stated above, some of the proposed additional evidence was available at trial or at the very least, could have been discovered or obtained by use of reasonable diligence. In any event, the proposed additional evidence is wholly irrelevant to the charges preferred against the applicant. There is, to our minds, no C miscarriage of justice because the concurrent judgments of the courts below are still liable to attack in the main appeals that are pending.

Hearsay, Privilege And Related Issues

[45] The respondent further objected to the admission of the proposed D additional evidence on the basis that the applicant's averments constitute hearsay and that the proposed *viva voce* evidence of certain witnesses to wit, the MACC officers are covered by privilege and/or are classified under the Official Secrets Act 1972.

[46] Given our findings on the applicant's non-compliance with s. 93 of the E CJA 1964, *Parks* and related cases, we do not consider it necessary to deal with this aspect of the respondent's objections.

Conclusion

[47] For all the reasons above stated, we find that the applicant has failed F to cross the high threshold of s. 93 of the CJA 1964 and decided judicial authorities. In the circumstances, the motion is hereby dismissed. For the avoidance of doubt, all motions in encls. 210, 31, 32 (as amended) are hereby dismissed.

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